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No. 472

In the Supreme Court of the United States

OCTOBER TERM, 1961

MILTON MARGOLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 9a-12a) has not yet been reported. The opinion of the district court (Pet. 1a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. 13a) was entered on June 29, 1961. A petition for rehearing was denied on September 7, 1961 (R. 8). The

petition for a writ of certiorari was filed on October 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was entrapped as a matter of law.

2. Whether the allegedly inconsistent jury verdicts can stand in the circumstances of this case.

3. Whether an attempt to bribe a judge of a district court to change a sentence is a violation of 18 U.S.C. 1503.

STATUTES INVOLVED

Section 206 of Title 18, U.S.C., provides:

> Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe, to any judge, juror, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote, opinion, or decision thereon, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be disqualified from holding any office of honor, trust, or profit under the United States.

Section 1503 of Title 18, U.S.C., provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, en-

deavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in three counts of two indictments, returned in the Eastern District of Wisconsin, with offenses arising out of his attempt illegally to obtain a suspended sentence in an internal

revenue case. The first indictment charged that petitioner, on July 12, 1960, indirectly offered District Judge Robert E. Tehan a $5,000 government bearer bond with the intent to influence the judge's action, in violation of 18 U.S.C. 206, *supra* (A. 17).[1] Count I of the second indictment charged that petitioner, on July 12, 1960, corruptly endeavored to influence the official action of an officer of a United States court, Judge Tehan, in violation of 18 U.S.C. 1503, *supra* (A. 2-3). Count II of the second indictment charged that petitioner, on July 12, 1960, corruptly endeavored to obstruct the due administration of justice, in violation of 18 U.S.C. 1503 (A. 3). The indictments were consolidated for trial (A. 1). A jury found petitioner not guilty on the first indictment, and guilty on both counts of the second indictment (A. 184). Petitioner was sentenced to concurrent terms of 5 years' imprisonment to be served consecutively to a one year sentence previously imposed for the internal revenue violations. He was also fined $5,000 (A. 7, 185).

The facts may be summarized as follows:

The petitioner is a doctor and staff physician in a Milwaukee hospital. On June 3, 1960, Judge Robert E. Tehan of the Eastern District of Wisconsin had sentenced the petitioner to one year's imprisonment on a plea of *nolo contendere* to charges of criminal violations of the internal revenue statutes (A. 20-21).

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[1] Petitioner's appendix in the court of appeals will be designated as "A.". The government's appendix is designated as "Govt.".

Under Rule 35, F.R. Crim. P., the judge could reduce the sentence within 60 days after it was imposed (see A. 21, 23).

On June 28, 1960, a Mr. Pikofsky, who had known petitioner for 25 years, approached Mr. Earl Villmow, who was a friend of the judge's son (Robert Tehan, Jr.), and asked Mr. Villmow to talk to the son in behalf of petitioner (A. 24, 45, 100-102). Mr. Villmow and the judge's son reported to the judge the fact that the approach had been made (A. 21, 24, 46). The judge told Villmow to keep the matter confidential (A. 46), and subsequently contacted the Federal Bureau of Investigation and the Internal Revenue Service (A. 22, 47).

On June 30, and again on July 2, Mr. Pikofsky inquired of Mr. Villmow whether he had spoken to the judge's son and Villmow said he had not done so (A. 25, 46). Actually, on July 2, Villmow did see the younger Tehan who suggested that Villmow take the attitude of "what's in it for me" (A. 48). In the evening of July 2, Villmow saw Pikofsky and was present when Pikofsky made arrangements by telephone to see petitioner that night (A. 49-50). Pikofsky, after talking with petitioner (A. 103-104), told Villmow that petitioner wanted to talk to him (A. 26, 104). Pikofsky repeated the request that Villmow call petitioner on July 4 (A. 26).

On July 3, F.B.I. agents asked Villmow to cooperate with them (A. 51). After receiving the call from Pikofsky on July 4, Villmow called the F.B.I., who instructed him to call the petitioner and find out why petitioner wanted to talk to him (A. 52). Villmow

and petitioner arranged to meet the following day (A. 28). The F.B.I. instructed Villmow that under no circumstances was he to suggest anything to the petitioner, but was just to meet and let petitioner tell him the purpose of the meeting (A. 29).

Villmow met petitioner at a park at 9:30 p.m., on July 5 (A. 28-29). Petitioner told him of the many people whom he had asked to intercede with the judge to have his sentence changed, but with no success (A. 31). Petitioner said that he was going ahead with a "no-holds-barred effort" to have his sentence suspended (A. 31). Petitioner offered to put $5,000 in escrow or with a third party to be held until sentence was suspended, and to pay another $5,000 within 10 days after he received a suspended sentence (A. 32). After a series of further calls and meetings, the petitioner, on July 12, 1960, gave Villmow a $5,000 government bearer bond to be given to Judge Tehan and agreed to give Villmow $5,000 for Villmow and Tehan Jr., after the sentence was suspended (A. 27-42). From July 4 to July 12, Villmow's telephone calls to petitioner were in the presence of F.B.I. agents and the meetings were under surveillance by the F.B.I. (A. 71-80, 89).

On July 15, 1960, F.B.I. agents went to petitioner's office in the hospital and informed him that there was a warrant out for his arrest (A. 80, 92-93). The petitioner was excused to perform an emergency operation (A. 93). Another F.B.I. agent saw petitioner leave by the back fire escape and go into a nearby house (A. 90) where he was subsequently arrested (A. 94).

Petitioner testified that he gave the bearer bond to Villmow to hire an attorney and that he cautioned Villmow to do "nothing wrong" (A. 114, 115). He said that he did not understand at first that the judge was to receive the money (A. 115), but admitted that he did understand that the judge would receive $5,000, prior to the time petitioner turned over that sum to Villmow (A. 121; Govt. 183-184). He testified that he left the hospital by the back fire escape because the arresting officer would not let him change his clothing before going to the marshal's office (A. 123, 142).

ARGUMENT

1. Petitioner contends that his defense of entrapment was established as a matter of law (Pet. 16-19). The fact is that there was clearly no entrapment at all in the legal sense, much less an issue which should have been decided by the judge without submission to the jury. Petitioner may have been induced and encouraged by his friends to commit this crime but the government played no such role. Pikofsky approached Villmow on June 28 and met petitioner on July 2 before the F.B.I. agents saw Villmow on July 3. The agents told Villmow not to suggest anything, but to let petitioner make the approaches. Certainly, Judge Tehan did not in any way originate or encourage the scheme. In short, the government merely allowed the plan conceived by petitioner and his friends to proceed—as it did. This is not entrapment. The government did not originate, manufacture, or instigate the criminal design. Cf. *Sherman* v. *United States*, 356

U.S. 369; *Sorrells* v. *United States*, 287 U.S. 435, 441-442. In submitting the issue to the jury, the trial judge accorded petitioner his full rights.

2. Petitioner argues that, since the basic facts were admitted, the verdicts of acquittal on the bribery indictment and conviction on the second indictment were inconsistent because the only jury issue on all charges was the defense of entrapment (Pet. 11-16). Recognizing that this question may be controlled by the decision in *Dunn* v. *United States*, 284 U.S. 390, he requests the Court to re-examine *Dunn* (Pet. 12). There is no occasion for such reexamination, for the verdict in this case is not necessarily inconsistent. The jury may have decided that, in the circumstances of this case, Judge Tehan was not or could not have been bribed and thus petitioner was not guilty of the crime defined under 18 U.S.C. 206, *supra*, p. 2, but that petitioner was guilty of "endeavoring" to influence the court or obstruct justice under 18 U.S.C. 1503, *supra*. There is another reason why the acquittal on the bribery count does not show that the jury credited the defense of entrapment. As the court below pointed out (Pet. App 11a), the acquittal on one indictment may well have been the result of feelings of compassion.

3. Petitioner argues that a federal judge is not an "officer in or of any court of the United States" within the purview of 18 U.S.C. 1503, and therefore that petitioner's acts were neither a corrupt endeavor to influence an officer of the court nor an obstruction of justice. His argument is based on the fact that the Act of March 2, 1831, 4 Stat. 487, was the pre-

decessor of both the present contempt statute (18 U.S.C. 401)[2] and the obstruction of justice statute (18 U.S.C. 1503). Section 1 of the 1831 Act defined acts constituting contempt which were punishable summarily, and Section 2 defined acts constituting obstruction of justice. Petitioner argues that, as used in Section 1, "officer" could not mean a judge since a judge could not be in contempt of his own court, and therefore "officer" as used in Section 2 (the predecessor of 18 U.S.C. 1503) should also be read as not to include a judge. The fact, however, that a particular kind of officer of the court, a judge, might never or rarely be in contempt does not show that Congress did not mean the term "officer" to include judges in other contexts. The plain meaning of the word includes judges as officers of a court, since they are so appointed and empowered. Thus, there was clear basis for this Court's inclusion of judges in the category of officers of the court, together with court personnel, in *Cammer* v. *United States*, 350 U.S. 399, 405.

In any event, as the court below held, an attempt to bribe a judge is an "obstruction of the due ad-

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[2] "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

ministration of justice," as charged in Count II (Pet. App. 12a). There is no reason to limit this general concluding phrase in Section 1503 to obstructions relating to the particular classes of individuals previously enumerated in that section, *e.g.*, witnesses, jurors, officers. Hence, even if, as petitioner contends, judges are not "officers" under that section, there was still in this case an obstruction of justice. See *United States* v. *Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664. Either count under 18 U.S.C. 1503 supports the verdict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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